Supreme Court, U. S.
FILED
JUL 20 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-103

CLAUDE DORSY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD M. GALE
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	12
Certificate of Service	12
Appendix A - Opinion of Fifth Circuit	A-1
Appendix B - Judgment and Commitment, USDC, So. Dist. of Fla.	A-2
Appendix C - Judgment of Fifth Circuit	A-6
Appendix D - Denial of Petition for Rehearing	A-7
Appendix E - Order of Supreme Court Extending Time	A-8

TABLE OF CASES

	PAGE
Brady v. Maryland, 373 U.S. 83	7, 11
United States v. Agurs, 427 U.S. 97	7, 11
UNITED STATES CODE	
18 U.S.C. §2	3, 9
18 U.S.C. § 371	3, 9
18 U.S.C. § 1001	9
18 U.S.C. § 1014	3, 9
28 U.S.C. § 1254(1)	2
UNITED STATES CONSTITUTION	
Fifth Amendment	2

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1978

NO.

CLAUDE DORSY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Claude Dorsy, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on March 29, 1979.

OPINIONS BELOW

This case is reported at 592 F.2d 1189, a copy of the opinion is incorporated in the Appendix to this petition (App., p. A-1).

The judgment and commitment order entered by the United States District Court for the Southern District of Florida is unreported and appears in the appendix (App., p. A-2).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 29, 1979 (App. p. A-6). A timely petition for rehearing and/or suggestion for rehearing en banc was denied May 24, 1979 (App., p. A-7). See 597 F.2d 283.

This Court on June 18, 1979, entered an order extending time to file the petition for writ of certiorari to and including July 23, 1979 (App., p. A-8). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER A *BRADY* MATERIAL REQUEST FOR ANY FEDERAL HOME LOAN BANK BOARD REPORT ON ANY BANK NAMED IN THE INDICTMENT WHERE THE REPORT DEALS WITH THE SUBJECT MATTER OF THE INDICTMENT IS SPECIFIC ENOUGH SO THAT A DISTRICT COURT'S DENIAL OF A MOTION FOR NEW TRIAL ON THE BASIS THAT THE PRECISE FHLBB REPORT (CONTAINING *BRADY* MATERIAL AND REVEALED SUBSEQUENT TO TRIAL) SHOULD HAVE BEEN TIMELY REQUESTED DENIES DEFENDANT A FAIR TRIAL MANDATED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V:

> "No person shall . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In a superseding indictment the petitioner was charged with a conspiracy and sixteen substantive counts for causing individuals to make false statements on loan applications (to federally insured savings and loan associations) in violation of 18 U.S.C. §§ 2, 371, and 1014 (Vol. 1, pp. 194-210).

The petitioner was found guilty by a jury on the conspiracy count and thirteen substantive counts and received probation plus a fine (Vol. 3, p. 545).

Common to the conspiracy and all substantive counts was an allegation that the petitioner caused applications to be prepared by others containing a false statement that a down payment had been made by the borrower or that the applicant falsely stated that he had made a deposit of a certain sum toward the purchase of a condominium unit.[1]

It was alleged also in the substantive counts that one or more other type of false statement was caused to be made by the the borrowing applicant through the petitioner. The thrust of the government's case on all of the counts, however, was that a false statement concerning a down payment or a deposit of a certain sum towards the purchase of a condominium unit was caused to be made by the petitioner via the applications of the respective borrowers.

Although all of the applicants testified that the petitioner had never caused them to submit a false statement, the testimony of the government's key witness, Charles Summers, Senior Vice-President of the Dade Federal Savings and Loan

1. Petitioner was in the business of selling condominium units during the recessionary period of 1975, where condominium sales were being made without the requirement of a cash down payment.

Association (Miami, Florida) constituted the most telling evidence against the petitioner as to whether he believed that all the down payments or deposits listed in the applications were made in cash and that he would not have loaned any money if the down payments were not in the form of cash.[2]

In the types of loans being sought the Code of Federal Regulations does not require that a down payment or deposit be only in the form of cash. 12 C.F.R., § 545.6-1(a)(d)(i). Even the government conceded the law is that a down payment may be in the form of a cash equity or its equivalent. (Vol. 16, p. 41).

The trial court was repeatedly perplexed as to the meaning of the term "down payment" and "deposit" as seen by the District Judge's comment that the law at the time the crimes were committed is vague in terms of its applicability (1'st Supp. R., p. 3).

In turn, jurors were thoroughly confused as to whether the applicant could give deposit of value other than cash as illustrated by their note to the Court as to whether a down payment may be considered anything other than cash (Vol. 15, p. 105; Court's Exhibit 1).

While the initial indictment was pending against petitioner, Dorsy and another, Bridges, the defendant specifically moved on October 26, 1977, for the following documents:

> "Any portion of any report of examination by the Federal Home Loan Bank Board of any savings and loan association named in the indictment which report in any way deals with any of the condominium projects named in the indictment or the defendants, their alleged agents or representatives." (Vol. 1, p. 66)

2. Although Summers' institution, Dade Federal Savings, was not named in all of the counts, the issue as to whether the banks believed the listed down payment or deposit was only in the form of cash was common to all the counts.

Thus, the petitioner *specifically* requested any applicable FHLBB report which contained any exculpatory information as to any project described in the original indictment (Vol. 1, p. 66). On October 28, 1977, the government refused to give any FHLBB reports to the defendant relating to the savings and loan associations named in the indictment. On March 8, 1978, five days prior to trial, a superseding indictment was returned against Mr. Dorsy as noted, *supra.* So, again, on March 13, 1978, the defendant, after being reindicted, filed another request for any portions of any FHLBB reports which discussed any projects in the indictment that would disclose Brady material as well as any impeaching information (Vol. 1, p. 247-249). The petitioner's motion to furnish Brady material was granted on March 29, 1978 (Vol. 2, pp. 327-328).

On or about April 10, 1978, approximately two days before trial was to commence, petitioner, after receiving from the government Jencks material was led to the conclusion that exculpatory and impeachment type evidence existed in a FHLBB report on Dade Federal Savings and Loan Association. Accordingly, petitioner immediately asked for the report issued by the Board dealing with examination of Dade Federal (Vol. 2, 428, 429).

The government advised the District Judge in open court on April 12, 1978, that inasmuch as the FHLBB report was with the latter agency, a court order was necessary to obtain a copy from Washington. This representation by the govern-

ment was highly erroneous and prejudicial since the United States Attorney in Miami had the FHLBB letter and contents of the Dade Federal report for the previous eighteen months.

In an order dated April 13, 1978, the trial court ordered that the Dade report be provided for an *in camera* inspection (Vol. 2, p. 340). At the end of the trial, on April 20, 1978, the government finally provided copies of the Dade Federal report to the District Judge (Vol. 3, p. 488).[3]

Although the trial court ordered the submission of specific portions of the Dade Federal FHLBB report to be given to Dorsy on April 21, 1978, the aforesaid report containing exculpatory evidence and impeachment evidence was given to the defendant on May 5, 1978, more than two weeks following the conclusion of the trial (Vol. 3,pp. 488-491).

In the defendant's Supplemental Motion for a New Trial it was vigorously argued that the deliberate concealment by the government of the FHLBB documents containing exculpatory evidence and evidence that would impeach the witness Summers clearly prejudiced the defendant and constituted a flagrant violation of the defendant's Constitutional Rights to Due Process and a fair trial (Vol. 3, 569-575).

Notwithstanding, the District Judge stated in his order denying the motion for new trial that the existence of the Dade Federal Savings report was known or reasonably should have been known to the petitioner in advance of trial and to that extent a more timely request for discovery should have been presented to the Court. The trial judge's confusion as to the specificity required in describing the *Brady* material

3. This report consisted of two parts, viz., a 9-page letter from FHLBB dated 9/2/76 to the United States Attorney, and an excerpt from the report consisting of 4 pages (pp. 6-9) described as "III Dorsy-Bridges Condominium Projects".

sought will be discussed, *infra*.

REASONS FOR GRANTING THE WRIT

> A defendant is denied due process of law where a *Brady* material request is not a general one but specifically seeks any FHLBB report on any bank named in an indictment if the report deals with the subject matter of the indictment. It is impossible to be any more specific in a *Brady* material request where the materials sought, viz., FHLBB reports are confidential documents prepared following non-public hearings. Thus the District Court was placing an intolerable burden on requesting the petitioner to be more specific by seeking a particular FHLBB report and indicating the subject matter thereof.

Brady v. Maryland, 373 U.S. 83, holds that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt, irrespective of the good faith or bad faith of the prosecution.

Adverting to the words "upon request", defense counsel in *Brady* requested the extrajudicial statements made by Brady's accomplice, one Boblit. This Court held that the suppression of one of Boblit's statements deprived *Brady* of due process, noting specifically that *the statement had been requested* and that it was "material".

In *United States v. Agurs*, 427 U.S. 97, this Court admonished:

> "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."

In the case, *sub judice*, notwithstanding the pretrial standing discovery order of October 6, 1977 to provide *Brady* material (first indictment); the pretrial standing discovery order of March 16, 1978 to provide *Brady* material (superseding indictment); and the specific request for any portion of any FHLBB report of any savings and loan association named in the indictment which report deals in any way with the condominium projects or the defendants named in the indictment, the government and the District Court declined to honor the spirit of *Brady* and *Agurs*.

Inasmuch as there were only four savings and loan associations named in the indictment, to wit: Dade Federal Savings & Loan Association, Franklin Federal Savings & Loan Association, First Federal Saving & Loan Association, and Florida Federal Savings & Loan Association, the action of the trial court and the government is unsurportable. [4]

Certainly the request for any FHLBB report containing Brady material concerning any of four banking institutions which dealt with the condominiums or defendants named in the indictment met the "specificity" test of Agurs. Yet, the the District Judge erroneously concluded that the request for the FHLBB report on Dade Federal was untimely (as the

4. Subsequent to the request for any FHLBB report containing Brady material, petitioner made a request for a FHLBB report "specifically" on Franklin Federal Savings and Loan Association, since a newspaper article made reference to said bank approving loans to the petitioner and his partner Bridges on condominium purchases without requiring a cash down payment. The District Judge granted the request for the Franklin Federal report, notwithstanding strenuous governmental objection.

FHLBB report on solely Dade Federal wasn't "specifically" requested until a few days before trial).

Such a narrow and incorrect construction of the term "specific request" by the trial court and, in turn, by the Fifth Circuit denied to the petitioner due process. Petitioner's request for any FHLBB report limited to four banks and to the subject matter of the indictment was not merely a general request for exculpatory matter; it was a specific and relevant request for "material" exculpatory evidence.

Materiality

Turning to the FHLBB report on Dade Federal it is found that said report was highly material in every sense of that term in that it supported the petitioner's contention that he was entirely candid in his dealing with Dade Federal.

On September 2, 1976 (eighteen months prior to trial) the FHLBB sent a letter addressed to the U.S. Attorney in Miami concerning possible violations of 18 U.S.C. §§ 2, 371, 1001, and 1014 involving Dorsy-Bridges condominium projects which included contents of the FHLBB report on Dade Federal. This letter (and in particular the FHLBB report) had its genesis in an FHLBB investigation of Dade Federal Savings and Loan Association. [5]

Exculpatory information contained in the letter and contents of the report reveal that refurbishing credits, rental credits, lease-option agreements and other credits were used as a down payment without the need for a cash outlay by the purchaser (Letter of September 2, 1976, p. 5).

5. See footnote #3, *supra*.

As to the report itself there was impeachment evidence that could have been effectively utilized by petitioner's skilled defense counsel on cross-examination of one of the government's key witnesses, Charles Summers, Senior, Vice-President of Dade Federal Savings and Loan Association. On behalf of the government, Mr. Summers testified (i) that he believed that all of the down payments on the applications were in fact made in cash and (ii) that he would not have loaned any money whatsoever on the Santona condominium project if the down payments were not in the form of cash. This same banker, who made a highly respectable appearance for the government, was found by the FHLBB in its report on Dade Federal concerning the Dorsy-Bridges condominiums to be personally loaning sums of money to one James Pion. This is of special significance inasmuch as the latter was the mortgage broker who brought all three Bridges-Dorsy projects to Dade Federal and presented them to Summers.

Additionally, the report in the government's possession for more than eighteen months prior to trial reflected some question as to whether there was a fee-splitting arrangement between Summers and Pion. The report stated that Summers made personal loans to Pion and that Summers received repayment of the loans from Pion through Pion's receipt of his commission for the placement of the Bridges-Dorsy Santona condominium project with Dade Federal. [6]

This same report stated that one loan by Summers of $2,000 to Pion could only be repaid by commissions earned by Pion on the Santona deal approved by Summers. The report concluded that Pion's confirmed financial distress made

6. In this regard, the report clearly found no connection with Dorsy or Bridges as far as Pion's commission for the placement of the Santona Condominium loans with Dade Federal through Summers.

Summers' conflict more pronounced since a loan payment was possible only if Pion could generate brokerage fee income. This latter finding was of such great significance to the FHLBB that the report on Dade Federal concluded that this conflict should be cited in the notice of charges against the latter institution.

The FHLBB report raised serious doubts about Summers credibility, honesty and integrity (Excerpt of Report, pp. 8-9). The FHLBB was apparently concerned about Summers and Pion, the mortgage broker, splitting fees. *Ibid.* It is respectfully submitted that since the letter from the FHLBB on the Dorsy projects as they involved Dade Federal and reference to contents of the Dade Federal report concerning the same projects with the exculpatory and impeaching evidence was available to the government since September 1976, said evidence was concealed or there was negligence by the government in overlooking same.

Petitioner was deprived of due process because the District Judge committed a grave Constitutional error in failing to grant his *Brady* request of any FHLBB report for the information sought met the requirement of specificity under the *Agurs* decision. Further, it was axiomatic that petitioner could not have been any more specific since the FHLBB reports are confidential and prepared after secret hearings.

CONCLUSION

Based upon the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Richard M. Gale
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 19th day of July, 1979.

Richard M. Gale

APPENDIX A

OPINION OF FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5423

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

CLAUDE DORSY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(MARCH 29, 1979)

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.

APPENDIX B

JUDGMENT AND COMMITMENT, USDC, So. Dist. of Fla.

UNITED STATES DISTRICT COURT for
United States of America vs. Southern District of Florida
DEFENDANT CLAUDE DORSY
Docket No. 77-440-Cr-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date June 26, 1978.

COUNSEL	WITH COUNSEL: F. Lee Bailey, Esq.; Kenneth J. Fishman, Esq.; & Gerald Kogan, Esq.
PLEA	NOT GUILTY.
FINDING & JUDGMENT	There being verdict of GUILTY. Defendant has been convicted as charged of the offense(s) of conspiracy to file false credit applications with federally insured savings and loan associations, all in violation of Title 18, United States Code, Section 372, as to Count 1; and knowingly and willfully causing to be made and filed false credit applications in connection with mortgage loan applications to various federally insured savings and loan associations, all in violation of Title 18, United States Code, Sections 1014 and 2, as to Counts 2 through 14 each respectively.

SENTENCE OR PROBATION ORDER	The court asked whether defendant had anything to say why judgment should not be prounounced.Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of as to Ct. 1 imposition of sentence of confinement be and the same hereby is withheld and the defendant is placed on probation with this Court for a period of TWO (2) YEARS under the Standing Conditions of Probation as defined by this Court's Order entered August 1, 1964. It is further ORDERED that the defendant pay a fine unto the United States of America in the sum of SEVEN THOUSAND FIVE HUNDRED ($7,500.00) DOLLARS. Defendant is to stand committed until said fine is paid. It is further
SPECIAL CONDITIONS OF PROBATION	ORDERED that as to each of Counts 2,3, 4,5,6,7,8,9,10,11,12,13 & 14, imposition of sentence of confinement be and the same hereby is withheld and the defendant is placed on probation with this Court for a period of TWO (2) YEARS as to each Count. It is ORDERED that each period of probation as to Counts 2,3,4,5,6,7,8,9,10, 11,12,13 & 14 are to run concurrently with each other and concurrently with the period of probation imposed as to Count 1. It is further

ORDERED that the defendant shall pay a fine unto the United States of America in the sum of ONE THOUSAND ($1,000.00) DOLLARS as to *each* of Counts 2,3,4,5,6,7, 8,9,10,11,12,13 & 14. TOTAL FINE TO BE PAID IS TWENTY THOUSAND FIVE HUNDRED ($20,500.00) DOLLARS.

The defendant shall have ten (10) days from June 26, 1978, in which to either file a notice of appeal with the appropriate supersedeas bond or pay the initial SEVEN THOUSAND FIVE HUNDRED ($7,500.00) DOLLARS fine.

ADDITIONAL CONDITIONS OF PROBATION — In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT — The court orders commitment to the custody of the Attorney General and recommends,

RECOMMENDATION — It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: s/ Sidney M. Aronovitz
U.S. District Judge Date 6/28/78

APPENDIX C

JUDGMENT OF THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514
Office of the Clerk

June 1, 1979

Mr. Joseph I. Bogart, Clerk
U. S. District Court
P. O. Box 010669
Miami, FL 33101

NO. 78-5423 - UNITED STATES OF AMERICA vs. CLAUDE DORSY

(Dist. Ct. No. 77-440-CR-SMA)

Dear Sir:

( ) Enclosed is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

(xx) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above

case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

( ) Copy of the Court's opinion.

(xx) Opinion record on appeal or review. (16 vols., 1 suppl.)

(xx) Original exhibits. (1 box & 1 flt. pkg. - returned under separate cover)

( ) Bill of Costs approved by this Court.

Very truly yours,

Edward W. Wadsworth, Clerk

By: s/ Brenda Hauck
Deputy Clerk

enc. (LETTER ONLY)
cc: Messrs. Kenneth J. Fishman
F. Lee Bailey
Ms. Marsha L. Lyons
Mr. Richard M. Gale

APPENDIX D

DENIAL OF PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Office of the Clerk

May 24, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5423 - U.S.A. v. CLAUDE DORSY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk

By: s/ Sally Hayward
Deputy Clerk

cc: Messrs. Kenneth J. Fishman
F. Lee Bailey
Mr. Richard M. Gale
Ms. Marsha L. Lyons

APPENDIX E

ORDER OF SUPREME COURT EXTENDING TIME

SUPREME COURT OF THE UNITED STATES

NO. A-1091

CLAUDE DORSY,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner;

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including July 23, 1979.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the United
States

Dated this 18 day of
June, 1979

Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

No. 79-103

In the Supreme Court of the United States

OCTOBER TERM, 1978

CLAUDE DORSY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. McMURRAY
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-103

CLAUDE DORSY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A-1).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1979 (Pet. App. A-1). A petition for rehearing was denied on May 24, 1979. On June 18, 1979, Mr. Justice Powell granted an extension of time within which to file a petition for a writ of certiorari to and including July 23, 1979, and the petition was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prosecution's failure to furnish petitioner with a copy of a report of the Federal Home Loan Bank Board deprived him of a fair trial under the principles of *Brady* v. *Maryland*.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one conspiracy count and 13 substantive counts alleging that he caused persons to make false statements in loan applications submitted to federally insured savings and loan associations, in violation of 18 U.S.C. 2, 371, and 1014. He was sentenced to two years' probation and fined $7,500 on the conspiracy count and to a concurrent term of two years' probation and a $13,000 fine on the substantive counts.

The evidence presented at trial disclosed that petitioner was engaged in the business of developing condominiums in Southern Florida. In order to arrange financing for his condominium projects, he induced certain persons to make false statements on mortgage applications presented to savings and loan associations. The mortgage applications in question stated that various applicants had made cash downpayments for their condominiums when, in fact, no such downpayments had been made (Tr. 286, 303, 351).[1] In furtherance of this scheme, petitioner caused two of his employees to open accounts at savings and loan associations in the name of mortgage applicants

[1]The funds falsely described as cash downpayments were in fact credits advanced by petitioner or businesses controlled by him (Tr. 231, 401). The amounts in question were thus liabilities, rather than assets, of the prospective borrowers and should have been listed as such (Tr. 241).

and placed money in the accounts in order to enhance their apparent creditworthiness (Tr. 228-230, 272-276, 302-305, 351). Those funds were described in the loan applications as assets of the individual borrowers, not as liabilities.

The government also presented evidence showing that petitioner caused his employees and other persons to execute loan applications that omitted or misrepresented material information (Tr. 285-286, 299, 390). Some of the applications so executed were never signed by the borrowers whose names appeared on the applications (Tr. 348, 377, 385-386). Petitioner paid some of the individuals who executed the applications (Tr. 283-284, 297, 390). He admitted to one such person that the legality of the mortgage applications was in a "gray area" (Tr. 295).

Officers of the creditor savings and loan associations testified that they understood that borrower downpayments were in the form of cash (Tr. 30, 83, 179), and that no secondary financing was involved (Tr. 106). Charles Summers, an officer of Dade Federal Savings and Loan Association, testified that if he had known that the mortgagees had made no cash downpayments, he would not have recommended an extension of credit (Tr. 179). Other witnesses confirmed that savings and loan associations rely generally on the information contained in credit applications in determining whether to grant mortgage loans (Tr. 83-84, 100, 136, 207, 716).

ARGUMENT

Petitioner contends (Pet. 7-11) that he is entitled to a new trial because the prosecution failed to produce a Federal Home Loan Bank report concerning the lending practices of one of the savings and loan associations described in the indictment (Dade Federal Savings and

Loan Association). He asserts that this failure deprived him of a fair trial within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Both the district court and the court of appeals correctly rejected that contention.

1. After the return of his initial indictment, petitioner moved for production of examination reports of the Federal Home Loan Bank Board concerning savings and loan associations described in the indictment to the extent that those reports related to the condominium projects referred to in the indictment or to petitioner or his agents. The government objected to this request. Following the return of a superseding indictment in March 1978, petitioner made a general request for exculpatory materials. Petitioner did not make a specific request for reports relating to the Dade Federal Savings and Loan Association until April 10, 1978—two days before the commencement of trial. At a hearing on petitioner's request, the prosecutor stated that a court order would be necessary prior to releasing the Federal Home Loan Bank Board's confidential examination report. On April 13, the court ordered the document to be produced for *in camera* inspection, and it received it from the government on April 20. On April 21, the court ordered production of certain portions of the report. By this time, petitioner had been convicted, and the question presented was whether the document was of such importance as to require a new trial. The district court reserved decision on that issue, noting that it was not suggesting that the information in the report "would have been significant with regard to the verdict returned" (April 21, 1978 Order at 2). The court also noted that petitioner's request for the report appeared to be untimely and that the information in the report was "cumulative" (*ibid.*).

Subsequently, the district court denied petitioner's motion for a new trial, holding that petitioner was not "prejudiced by reason of the failure to have available the requested and sought discovery prior to trial," and that the report in question would not "have created a reasonable doubt as to Defendant's guilt or innocence" (June 21, 1978 Order at 3). The district court again noted that the evidence in question was "cumulative" and that petitioner had failed to make "a timely request for production" (*ibid.*).[2]

2. Under these circumstances, petitioner's reliance on *Brady* v. *Maryland* is misplaced. *Brady* requires a new trial only where the undisclosed evidence would be "material" to the defense. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972). As the Court noted in *Agurs*, *supra*, 427 U.S. at 109-110:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

In order to sustain his burden on a motion for a new trial, the defendant must establish that the evidence in question creates a reasonable doubt regarding his guilt that would not otherwise exist. *Id.* at 112.

As the courts below properly concluded, the report of the Federal Home Loan Bank Board does not create a reasonable doubt regarding petitioner's guilt. The report criticizes the Dade Federal Savings and Loan Association for adopting lax credit policies and for failing to conduct

---

[2]The district court's April 21, 1978 and June 21, 1978 Orders are reproduced in the appendix attached to this brief.

adequate investigations prior to approving loans for petitioner's condominium projects. But the negligence of various employees of the federally insured savings and loan association, or their nonreliance on false information, provides no defense to petitioner. 18 U.S.C. 1014 makes it a crime for any person to "knowingly make [ ] any false statement or report * * * for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any * * * loan." Thus, the government establishes criminal liability by proving that the defendant has made or caused to be made a false statement for the specified purpose. Complicity or negligence by officers of the financial institution does not absolve the defendant of criminal liability. See, *e.g.*, *United States* v. *Fairbanks*, 541 F. 2d 862, 863-864 (10th Cir.), cert. denied, 429 U.S. 1002 (1976); *United States* v. *Braverman*, 522 F. 2d 218, 223 (7th Cir.), cert. denied, 423 U.S. 985 (1975); *United States* v. *Niro*, 338 F. 2d 439, 440-441 (2d Cir. 1964); *United States* v. *Goberman*, 458 F. 2d 226, 229 (3d Cir. 1972). The evidence presented by the government in this case showed that petitioner conspired to make, and caused other persons to submit, false statements in loan applications and that those false statements had the purpose and capacity to influence federally insured financial institutions. Because the examination report of the Federal Home Loan Bank Board had no tendency to rebut that showing of guilt, its nondisclosure does not violate the rule in *Brady*.[3]

[3]Moreover, as noted by the district court, the substance of the report was cumulative. Counsel established on direct and cross-examination of various witnesses that some of the financial institutions did not rely substantially on the contents of loan applications, that factors other than cash down payments were of importance in extending credit, and that information in credit applications was not always verified (Tr. 76-80, 113-119, 168-170, 611-674, 699-706, 717-723). Nondisclosure of cumulative evidence does not require a new trial. *United States* v. *McCrane*, 575 F. 2d 58, 61 (3d Cir. 1978).

3. Petitioner further contends (Pet. 10-11) that the examination report of the Federal Home Loan Bank Board could have assisted him in cross-examining one of the government's witnesses (Charles Summers) because it indicated that the witness had become involved in a conflict of interest in his administration of certain loans on petitioner's condominium projects. However, even if this information served generally to undermine the credibility of the government's witness, it would not suggest doubt about petitioner's guilt. As noted by petitioner (Pet. 10), the substance of the testimony of the witness was that he believed that actual cash down-payments had been made by mortgage borrowers, and that he would not have recommended an extension of credit to such persons if he had known that no cash down-payments had been made. Impeaching the credibility of this witness on these points could not have raised a reasonable doubt about the dispositive issue in this case—whether petitioner knowingly caused the filing of false information for the purpose of influencing an extension of credit.[4]

[4]The trial court also was correct in concluding that petitioner knew or should have known of the existence of the Federal Home Loan Bank Board examination report well in advance of trial. Indeed, petitioner admitted prior knowledge of the existence of the report in his motion for a new trial. The purpose of the *Brady* rule is to assure that the government furnishes important exculpatory information that is known to it but not the defendant. *Brady* is not violated where the defendant knows of the existence of a document but fails to make a timely motion for its production. See *United States* v. *Ruggiero*, 472 F. 2d 599, 604-605 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States* v. *Riley*, 530 F. 2d 767, 771 (8th Cir. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTOPHER M. MCMURRAY
Attorney

SEPTEMBER 1979

DOJ-1979-09

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-440-CR-SMA

UNITED STATES OF AMERICA, Plaintiff

vs.

CLAUDE DORSY, Defendant

ORDER

UNDER DATE of April 10, 1978 Defendant filed a Motion for Discovery and Production of Favorable Evidence (*Brady* v. *Maryland*, 373 U.S. 83 (1963)). On April 11, 1978 the government's response thereto was filed. On or about April 12, 1978 the first day of trial to a jury of the indictment and the Defendant in this action, this Court, having conducted an *in camera* inspection of a transcript of one statement of a witness that day furnished by the government as described in said Motion, ordered and directed that said statement in its entirety be forthwith produced and delivered to the Defendant. Thereupon the transcripts of three other witnesses were provided to the Court, and after an overnight *in camera* inspection, the Court ordered excerpts from two transcripts to be delivered to defense counsel on April 13, 1978 (during trial).

Government counsel, in addition to arguing the timeliness of the Motion, pointed out on April 13, 1978 that one of the statements requested by Defense Counsel consisted of an official report of an examination proceeding by the Federal Home Loan Bank Board to which the Department of Justice does not have access to and which would require an order of the Court to obtain its production. Such an order was signed by this Court

the same day (April 13, 1978) and government counsel sought the report from the Federal Home Loan Board, Washington, D.C.

The report of the Federal Home Loan Bank Board as to its examination of Dade Federal Savings and Loan Association, Miami, Florida was presented to the Court on April 20, 1978, the second day of the jury's deliberation of its verdict in these proceedings and, therefore, the day upon which the jury's verdict was returned.

Although this Court finds that there is merit to the government's argument as to the timeliness of the Defendant's Motion, nevertheless, the Court has conducted an *in camera* examination of said Report and finds that there may be material therein which could be considered as exculpatory, although cumulative. In view thereof this Court feels duty bound to make a ruling on the matter at hand, notwithstanding that the verdict of the jury has been received and entered in the record wherein Defendant has been found guilty and adjudicated guilty as to Counts I through XIV inclusive. In making this ruling this Court is not suggesting nor ruling at this time that even if the information in said Report is truly Brady material that it would have been significant with regard to the verdict returned. Thereupon, it is -

ORDERED AND ADJUDGED that the following specific portions of the Final Report and Recommendations appearing in a Federal Home Loan Bank Board Memo dated September 13, 1976, regarding the formal examination of Dade Federal shall be furnished forthwith by government counsel to the Defendant through his counsel, as follows:

(a) All of Section III of said Report containing the heading *Dorsey-Bridges Condominium Projects* commencing on Page 6 and extending through the third paragraph on Page 9 of said Report.

(b) Exhibit 3 attached [to] said report consisting of a letter dated September 1976 addressed to the Hon. Robert W. Rust, U.S. Attorney, by Daniel J. Goldberg, Acting General Counsel, Federal Home Loan Bank Board.

It is further -

ORDERED AND DIRECTED that the aforegoing portions of said Report shall be furnished for the exclusive use of the Defendant and his counsel in this cause of action and shall not be divulged, copied, circulated or otherwise transmitted by Defendant, his counsel, or anyone to any other person or persons without the prior order of this Court, and it is -

ORDERED AND ADJUDGED that the Report filed and received in this Court under date of April 20, 1978 together with all attachments shall be sealed by the Clerk and shall remain a part of the record of this action available only for Appellate purposes and use or as the further order of this Court may direct.

DONE AND ORDERED at Miami, Florida this 21 day of April, 1978.

/s/ Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-440-CR-SMA

UNITED STATES OF AMERICA, Plaintiff

v.

CLAUDE DORSY, Defendant

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL & MOTION FOR NEW TRIAL

THIS CAUSE was considered by the Court upon the following matters:

Defendant's Motion for Judgment of Acquittal made during trial pursuant to and under Rule 29(b) F.R.Cr.P. and Defendant's Motion for New Trial pursuant to Rule 33 of the F.R.Cr.P.

The Court has studied the motions, the very extensive Memorandum of Law filed by Defendant in support thereof, including the Supplemental Memorandum in Support of Defendant's Motion for New Trial, the Government's various responses thereto, applicable portions of the Court Record including the transcript of the trial herein; and thereupon being otherwise fully advised in the premises,

It is ORDERED and ADJUDGED as follows:

1) The Motion for Judgment of Acquittal made in behalf of the Defendant Claude Dorsy pursuant to and under Rule 29(b) F.R.Cr.P. be and the same is hereby DENIED.

2) The Motion for New Trial filed herein by Defendant Claude Dorsy be and the same is hereby DENIED. This Court has fully reviewed the subject matter argued in Defendant's Supplemental Memorandum in Support of his Motion for New Trial, particularly addressed to the failure of Government Counsel to produce to the Defendant in advance of trial segments of the Federal Home Loan Bank Board (FHLBB) Report on Dade Federal Savings & Loan Association. Defendant's grounds for new trial by reason of the aforegoing rests upon *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Agurs*, 96 S. Ct. 2392 (1976).

When this Court entered its post trial Order dated and filed April 21, 1978, whereby it ordered the production by the Government of the requested discovery after an *in camera* inspection, the Court noted therein that the Government had argued the timeliness of the Motion for Production. The Government urged that inasmuch as the FHLBB Report was with FHLBB, it in fact would require an Order of the Court for a copy thereof to be obtained from FHLBB after the specific Motion for Production of same had been made by Defendant on the date of commencement of trial. Such an Order was entered by this Court immediately - April 13, 1978. The existence of such a report was known or reasonably should have been known to Defendant in advance of trial and to the extent that it were deemed material and necessary, then a more timely Request for Discovery thereupon should have been presented to the Court. It should also be noted that Defendant Dorsy had moved in advance of trial for the Court to order the production of a specific FHLBB Report on Franklin Savings & Loan Association. This Court ordered that report to be produced. Relief could have been similarly afforded to the Defendant with regard to the Dade Federal Report had the request been timely made.

Under *Brady*, a finding of materiality is required in order to grant a new trial. *Giglio* v. *United States*, 407 U.S. 150, 154 (1970). See also *United States* v. *Agurs*, *supra* wherein the United States Supreme Court held that the burden of establishing materiality is not met unless the Defendant can show that the non-disclosed evidence would create a reasonable doubt as to the Defendant's guilt or innocence. The fact that individuals (officers or members of loan committees) at a savings and loan association may have been aware that false statements were being submitted is of no consequence to the jury's determination of the Defendant's guilt or innocence. *United States* v. *Niro*, 338 F. 2d 439 (2nd Cir. 1964). Here, as in *Niro*, the Defendant is charged with knowingly and willfully making and causing to be made false statements upon applications and other loan documents "for the purpose of influencing the actions of various institutions." And, as in *Niro*, the parallel of factual circumstances herein compared to *Niro* is significant. Here, the materials sought were cumulative. This Court cannot find that the Defendant made a timely Request for Production, nor that Defendant was prejudiced by reason of the failure to have available the requested and sought discovery prior to trial, nor that the nondisclosed evidence would have created a reasonable doubt as to Defendant's guilt or innocence.

DONE AND ORDERED at Miami, Florida, this 21 day of June, 1978.

/s/ Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE